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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH KENT SOWDER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0705-CR-234
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0602-FB-24

October 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Joseph Sowder appeals his convictions and sentences after a jury found him guilty of attempted criminal deviate conduct, a Class B felony; criminal confinement, a Class D felony; battery, a Class A misdemeanor; and operating a vehicle while intoxicated, a Class A misdemeanor. On appeal, Sowder raises two issues, which we expand and restate as 1) whether the trial court abused its discretion when it admitted a search warrant into evidence; 2) whether the trial court properly sentenced Sowder; and 3) whether Sowder's convictions for criminal confinement and battery placed him in double jeopardy. Although we conclude that the trial court's admission of the search warrant was harmless error and that the trial court properly sentenced Sowder, we reverse Sowder's battery conviction and remand with instructions to vacate the conviction because it placed Sowder in double jeopardy.

Facts and Procedural History

On February 8, 2006, M.H. was walking home when Sowder pulled up in his van and asked if she wanted a ride. M.H. accepted and gave Sowder directions to her home, but became nervous when Sowder ignored the directions and parked his van in a parking lot. When M.H. reached for the door handle, Sowder punched M.H. in the face, placed his arm across her neck, and pulled her face toward his exposed penis. Sowder told M.H., "get me off and I'll let you go." Transcript at 198. M.H. refused and tried to escape by reaching for the van's key in an attempt to throw it out the window, but Sowder grabbed her hand and punched her in the face two more times. At that point, M.H. saw a pickup truck pull into the parking lot and started screaming to get the driver's attention. Detective John Greenlee of

the Fort Wayne Police Department was driving the truck and heard M.H.'s screams. When Detective Greenlee pulled up to the van, Sowder sped away leaving M.H. behind. Detective Greenlee pursued the van for several blocks until uniformed police officers pulled the van over and arrested Sowder. When Sowder exited the van, the officers smelled alcohol on his breath and observed that his speech was slurred and his eyes were bloodshot.

The State charged Sowder with attempted criminal deviate conduct, a Class B felony; criminal confinement, a Class D felony; battery, a Class A misdemeanor; and operating a vehicle while intoxicated, a Class A misdemeanor. The jury found Sowder guilty on all charges. The trial court sentenced Sowder to twenty years for the attempted criminal deviate conduct charge, two years for the criminal confinement charge, one year for the battery charge, and one year for the operating a vehicle while intoxicated charge. The trial court also ordered that Sowder serve his sentences consecutively, resulting in a total executed sentence of twenty-four years. Sowder now appeals.

Discussion and Decision

I. Admission of Evidence

Sowder argues the trial court committed reversible error when it admitted a search warrant into evidence over his objection. The admission or exclusion of evidence is within the trial court's discretion. Pickens v. State, 764 N.E.2d 295, 297 (Ind. Ct. App. 2002), trans. denied. Abuse of that discretion occurs when the court's ruling is clearly against the logic and effect of the facts and circumstances before the court. Id.

A search warrant should not be introduced into evidence for the jury's consideration. Guajardo v. State, 496 N.E.2d 1300, 1303 (Ind. 1986). The rationale for this rule is that search warrants generally "have no bearing on any issue before the jury" and "often contain statements highly prejudicial to the defendant." Id. The search warrant to which Sowder objected stated there was probable cause to search Sowder for "human blood, human hair, human cells, and/or human saliva . . . ." State's Exhibit 23. Although the prosecutor did not state so explicitly, our review of the record indicates she offered the warrant to show the State followed proper procedures in obtaining a DNA sample from Sowder. Whether the State followed proper procedures in obtaining a DNA sample is relevant to determining the sample's admissibility, which is not an issue for the jury to decide. See Ind. Evidence Rule 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the Court . . . ."). Thus, the trial court abused its discretion when it admitted the search warrant into evidence.

Although the trial court abused its discretion, we will not reverse Sowder's convictions unless he can establish that the trial court's error prejudiced his substantial rights. Martin v. State, 622 N.E.2d 185, 188 (Ind. 1993). An error does not prejudice a defendant's substantial rights if substantial independent evidence of guilt convinces us there is no substantial likelihood that the erroneously admitted evidence contributed to the convictions. Bonner v. State, 650 N.E.2d 1139, 1141 (Ind. 1995).

Sowder describes the jury's verdicts as turning on whether his testimony or M.H.'s was more credible. Given the "she said, he said" nature of the evidence, Sowder argues the

search warrant contributed to his convictions because "a juror wrestling with a credibility contest would find reassurance in the trial judge's finding of 'probable cause' to assist in resolving doubt in favor of a vote for guilty." Appellant's Brief at 12. The State appears to take the position that not only is there no substantial likelihood the search warrant contributed to Sowder's convictions, but that the search warrant was incapable of contributing to the convictions because it "simply indicated there was sufficient information to warrant further investigation as to what happened." Appellee's Brief at 7.

We do not think the warrant's admission was as innocuous as the State claims it was. Although we agree the face of the warrant states a judicial finding of probable cause to conduct a search, an inference the jury may have drawn from this statement is that if there was probable cause to search for evidence of crimes, the object of that search, Sowder, must have committed the crimes. We therefore disagree with the state that the warrant could not have contributed to Sowder's convictions.

At the same time, however, it was Sowder's burden to establish a substantial likelihood that the search warrant contributed to his convictions. In this respect, Sowder's argument overlooks the substantial independent evidence of his guilt. Regarding the battery and operating a vehicle while intoxicated charges, Sowder testified he slapped M.H. at least once and admitted he was intoxicated, and Sowder's counsel conceded during closing argument that he was guilty of those charges. Regarding the attempted criminal deviate conduct and criminal confinement charges, M.H. testified Sowder punched her in the face when she tried to exit the van, placed his arm across her neck, and pulled her face toward his

exposed penis stating, "get me off and I'll let you go." Tr. at 198. This evidence convinces us the erroneously admitted search warrant did not contribute to Sowder's convictions. Cf. Staton v. State, 524 N.E.2d 6, 9 (Ind. 1988) (concluding substantial independent evidence of guilt supported the defendant's convictions for criminal deviate conduct and criminal confinement based on the victim's testimony that the defendant ordered her into a car at knifepoint and inserted his finger into her vagina). Thus, it follows that the trial court's admission of the search warrant into evidence was harmless error.

II. Imposition of Sentence

Sowder argues the trial court abused its discretion when it enhanced the sentences for three of his convictions and when it ordered that all four sentences be served consecutively. Sowder's arguments are without merit in light of our supreme court's decision in Robertson v. State, 871 N.E.2d 280, 281-82 (Ind. 2007). Prior to the supreme court's decision in Robertson, a panel of this court held that Indiana Code section 35-50-2-1.3(c)(1) prohibits a trial court from "deviat[ing] from the advisory sentence for any sentence running consecutively." Robertson v. State, 860 N.E.2d 621, 625 (Ind. Ct. App. 2007), trans. granted, opinion vacated in relevant part, 871 N.E.2d 280 (Ind. 2007). In Robertson, however, our supreme court reversed this court's decision, holding that "under the sentencing laws from April 25, 2005, a court imposing a sentence to run consecutively to another sentence is not limited to the advisory sentence. Rather, the court may impose any sentence within the applicable range." 871 N.E.2d at 281-82. The amended sentencing scheme applies to Sowder because he committed his crimes on February 8, 2006, nearly ten months after the

sentencing scheme was enacted. See Anglemyer v. State, 868 N.E.2d 482, 491 n.9 (Ind. 2007). Thus, in light of our supreme court's decision in Robertson, the trial court did not err in enhancing three of Sowder's convictions and ordering that all of them be served consecutively.

III. Double Jeopardy

Sowder argues his convictions for criminal confinement and battery as well as his convictions for attempted criminal deviate conduct and battery placed him in double jeopardy.[1] The double jeopardy clause of the Indiana Constitution prohibits multiple convictions if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999). In determining what evidence the trier of fact used to establish the essential elements of an offense, "we consider the evidence, charging information, final jury instructions . . . and arguments of counsel." Rutherford v. State, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007).

To convict Sowder of criminal confinement as a Class D felony, the State had to prove beyond a reasonable doubt that Sowder knowingly or intentionally confined M.H. without her consent. See Ind. Code § 35-42-3-3(a). To convict Sowder of battery as a Class A

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[1] The State argues Sowder waived this argument "by failing to cite any authority supporting it." Appellee's Br. at 8; see also Ind. Appellate Rule 46(A)(8)(a). Although we agree with the State that Sowder's argument is deficient in this respect and that we would be within our discretion to disregard it, we choose instead to address Sowder's claim because of our preference to decide cases on their merits. See Welch v. State, 828 N.E.2d 433, 435-36 (Ind. Ct. App. 2005).

misdemeanor, the State had to prove beyond a reasonable doubt that Sowder knowingly or intentionally touched M.H. in a rude, insolent, or angry manner resulting in bodily injury. See Ind. Code § 35-42-2-1(a). The evidence presented at trial indicates Sowder punched M.H. in the face when she tried to exit the van and grabbed her hand and punched her in the face two more times when she tried to throw the van's key out the window.

The State argues Sowder criminally confined M.H. based on the first punch and battered M.H. based on either the second or third punch. Although we agree with the State that the jury may have found Sowder committed the crimes in this sequence, the prosecutor failed to explain which of Sowder's punches constituted proof of criminal confinement and which constituted proof of battery. Instead, during closing argument, the prosecutor argued the jury could find that any of Sowder's punches satisfied the confinement element:

> How do we know she's confined? She told you, I tried to get out of that car and he punched me in my face and you saw the injuries and she began to struggle. What did he say? Get me off and I'll let you go. He's exerted his will over her will. Against her will, she is not free to leave. Cause [sic] her attempts to leave result in that big struggle that resulted in him being scratched and her being struck multiple times.

Tr. at 492. Likewise, regarding the battery charge, the prosecutor argued, "I have proof that the defendant knowingly or intentionally, in a rude, insolent or angry manner, touched [M.H.] and it caused injury," but failed to specify which of Sowder's punches constituted proof of battery. Id. at 490. Sowder's counsel added to the uncertainty when she conceded, "Count III which is the Battery, [Sowder] tells you that he struck [M.H.] and he probably struck her more than once is what he said. . . . [Y]ou ought to find him guilty on Count III as

well." Id. at 501; cf. Bruce v. State, 749 N.E.2d 587, 591 (Ind. Ct. App. 2001), trans. denied (concluding the defendant's convictions for criminal confinement and attempted aggravated battery did not place him in double jeopardy in part because "[d]efense counsel . . . emphasized the separateness of the confinement and attempted aggravated battery counts"). Finally, the charging informations do not specify the factual allegations supporting each charge. Instead, the charging information for criminal confinement states Sowder "did knowingly or intentionally confine [M.H.], without the consent of [M.H.]," and the charging information for battery states Sowder "did knowingly or intentionally touch [M.H.] in a rude, insolent, or angry manner, resulting in bodily injury . . . ." Appellant's Appendix at 21, 22.

We emphasize the State could have proved confinement in a variety of ways other than relying on Sowder's punches. See Ind. Code § 35-42-3-1 ("As used in this chapter, 'confine' means to substantially interfere with the liberty of a person."). We also emphasize the State could have proved battery and confinement based on Sowder's punches and avoided double jeopardy concerns by distinguishing which punch constituted proof of battery and which constituted proof of confinement. However, our review of the record[2] convinces us that the manner in which the State pled, proved, and argued its case created a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of the criminal confinement offense also may have been used to establish the battery offense. It

[2] The record did not include the final jury instructions, which would have aided our double jeopardy analysis. See Waldon v. State, 829 N.E.2d 168, 179 (Ind. Ct. App. 2005), trans. denied ("Without the jury instructions, our ability to determine whether the jury was properly focused upon certain evidence in order to avoid double jeopardy is virtually impossible. However, it is [the Appellant's] burden to support his claims, and we will address the merits of his argument to the best of our ability given what he has provided.").

therefore follows that Sowder's convictions for criminal confinement as a Class D felony and battery as a Class A misdemeanor placed him in double jeopardy. On remand, we instruct the trial court to vacate the battery conviction. See Spears v. State, 735 N.E.2d 1161, 1166 (Ind. 2000) (stating that the remedy for a double jeopardy violation is to reduce or vacate one of the convictions). Because we order the trial court to vacate Sowder's battery conviction, we do not address whether Sowder's convictions for attempted criminal deviate conduct and battery placed him in double jeopardy.

Conclusion

The trial court's admission of the search warrant was harmless error and the trial court properly sentenced Sowder, but we reverse Sowder's battery conviction and remand with instructions to vacate the conviction because it placed Sowder in double jeopardy.

Reversed and remanded.

KIRSCH, J., and BARNES, J., concur.